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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Intex Recreation Corp.

Serial No. 76437166

David N. Makous, Esq. for Intex Recreation Corp.

Won T. Oh, Trademark Examining Attorney, Law Office 114,
(K. Margaret Le, Managing Attorney).

Before Hanak, Walters and Bucher, Administrative Trademark
Judges.

Opinion by Hanak, Administrative Trademark Judge:

Intex Recreation Corp. (applicant) seeks to register
THE WET SET in typed drawing form for "power tools used to
clean swimming pools, namely machines for cleaning surfaces
using water pressure" (Class 7) and for "hand tools used to
clean swimming pools, namely pool leaf skimmers" (Class 8).
The application was filed on July 31, 2002 with a claimed
first use date at least as early as 2000 as to both classes
of goods. For ease of reference, applicant's Class 7 goods
will be referred to as "pool scrubbers" and applicant's
Class 8 goods will be referred to as "pool skimmers."

The Examining Attorney refused registration on the basis that purportedly "applicant's specimen did not support use of the mark for the identified goods." (Examining Attorney's brief page 1). When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request a hearing.

As the Examining Attorney acknowledges, applicant's specimen is a label affixed to "the container or packaging for the goods." (Examining Attorney's brief page 2). Applicant's label essentially consists of three parts. The first part features a picture of a teenage girl using applicant's pool skimmer. The second part features a picture of a teenage boy using applicant's pool scrubber. The third part features pictures of both the pool skimmer and the pool scrubber, as well as a text explanation that inside the packaging there is a pool skimmer and a pool scrubber. The mark THE WET SET appears prominently five times on applicant's label. On three occasions, the mark THE WET SET is followed by the generic terminology "pool maintenance kit."

In his final office action dated February 17, 2004, the Examining Attorney refused registration solely on the basis "that the specimens submitted by applicant show use

of the mark for a pool maintenance kit, not the individual components of the kit [the pool scrubber and the pool skimmer]." The Examining Attorney cited absolutely no authority to support his refusal.

Applicant's position is simple, namely, that its label affixed to the containers for its pool scrubbers and pool skimmers is a sufficient specimen pursuant to the definition of the term "Use in Commerce" as set forth in Section 45 of the Trademark Act. Applicant notes that there is no dispute that its specimen is a label affixed to containers which hold its pool scrubbers and pool skimmers. Moreover, applicant notes that its label clearly differentiates its pool skimmers and its pool scrubbers, and its mark THE WET SET is used in connection with both its pool skimmers and its pool scrubbers.

We concur with applicant's reasoning. The Examining Attorney has failed to present any authority whatsoever stating that it is impermissible to place two different (albeit related) goods in the same packaging as long as the label affixed to the packaging clearly makes use of the mark sought to be registered in connection with each of the two types of goods for which registration is sought. In this case, the mark THE WET SET is used in connection with

the pool scrubber, and the mark THE WET SET is used in connection with the pool skimmer.

Ironically, for the very first time at page 3 of his brief, the Examining Attorney suggests the following:

"Applicant's specimen would be acceptable if applicant's identification of goods were as follows: 'Pool maintenance kit comprised of pool leaf skimmers and power tools used to clean swimming pools in the nature of machines for cleaning surfaces using water pressure.'" We use the term "ironically" because the Examining Attorney's very belated proposed identification of goods would have given applicant the same degree of protection in that it would have covered both the pool scrubbers and the pool skimmers, and yet would have saved applicant the expense of filing a two class application.

In short, applicant's specimen of use is clearly sufficient to support registration of THE WET SET for both pool scrubbers and pool skimmers because the pictures and text show use of said mark in connection with pool scrubbers, on the one hand, and pool skimmers, on the other hand.

Decision: The refusal to register is reversed.